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No. —

In the Supreme Court of the United States

OCTOBER TERM, 1960

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CELANESE CORPORATION OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CELANESE CORPORATION OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit entered in this case.

OPINIONS BELOW

The opinion of the court below (App., *infra*, pp. 17–22) is not yet reported. The findings of fact, conclusions of law, and order of the Board (J.A. 85–97, 103–105)[1] are reported at 125 NLRB No. 43. The Board's decision in the representation proceeding (J.A. 64–72), which forms part of the record here, is reported at 121 NLRB 303.

[1] "J.A." refers to the portion of the record printed as the Joint Appendix in the court below.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1960 (App., *infra*, p. 23). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the court below erred in setting aside a representation election because the prevailing union had made a misstatement of fact during the election campaign, where the National Labor Relations Board had found that the employees could adequately evaluate the error, if any, and thus were not misled.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 8. (a) It shall be an unfair labor practice for an employer—
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *
>
> SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of

employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

* * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) * * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

STATEMENT

A. THE BOARD'S DECISION AND ORDER

On March 5, 1958, after the Textile Workers Union of America, AFL–CIO, herein called the Union, filed a representation petition with the Board, the respondent Company and the Union entered into an election agreement. This agreement, approved by the Board's Regional Director, provided for an election to be held on March 12, in the Company's Gallipolis Ferry, West Virginia plant, to determine whether the production and maintenance employees wanted the Union to be their bargaining representative (J.A. 22, 64).

During the period from February 14 to March 8, the Company sent a series of eleven letters (J.A. 35–58) to each of the employees in the unit (J.A. 107–108). Eight of these letters were devoted to a discussion of the various "benefits" currently being received by employees. Many subjects were covered, ranging from wages (J.A. 49, 50, 56, 58), vacations, and paid holidays (J.A. 49–50), to the new lunchroom that was being built and the Company's contributions to an employee social club (J.A. 43–44). The Company's attitude toward the various employee benefits was restated in its final letter, which contained a summary of the benefits discussed in earlier letters (J.A. 56):

> These changes were made because of our progress as individuals working for our company and not because a labor organization demanded that they be done.

Three of the Company's eleven letters were primarily discussions of the time, place, and mechanics of the

forthcoming election (J.A. 35–36, 41–42, 54–55). These letters also pointed out to the employees the seriousness of the issue to be decided, and urged that they should vote with full knowledge of the facts. In this connection, the Company's February 22 letter stated (J.A. 42):

> Do not let rumors, misinformation, and unfounded promises sway your judgment nor be misled by propaganda calculated to make you fearful.

The Union replied to the Company's series of letters with two letters of its own on February 24 and March 10 (J.A. 59–63). The second letter was handed to twenty employees on March 10, and mailed to the other employees that evening and received the next day (J.A. 115). This letter began as follows (J.A. 61):

> Dear Friend:
>
> The repetitious letters sent to you by the Plant Manager seem to betray an inner sense of guilt. In his letters, Mr. Pearson seems to be taking credit for almost everything but the Declaration of Independence.
>
> He says that all of the fine fringe benefits show the Company's interest in your concern. This could be something less than the truth, for the fact is that Celanese fringes, as well as other plant conditions, were won through collective bargaining and in many instances over the initial opposition of the Company.

The March 12 election was won by the Union, 25 to 22 (J.A. 6). The Company filed objections to the election, contending that the March 10 letter contained

a "material misrepresentation made by the Union affecting the choice by employees," and that the employer had had no time to reply to it (J.A. 4). The Company asserted that the misrepresentation consisted of the Union's statement that "Celanese fringes, as well as other plant conditions, were won through collective bargaining * * *" (J.A. 8). Construing the Union's claim to have been that *all* the fringe benefits mentioned in the Company's letters were won through collective bargaining, the Company offered proof that a number of the matters discussed in its letters had never been contained in a collective bargaining contract at any of its plants (J.A. 9). The Regional Director, after investigation of the Company's objections, issued a report recommending that they be overruled (J.A. 11), whereupon respondent filed exceptions with the Board (J.A. 19–34).

The Board, upon review of the record, agreed with the Regional Director that the Union's letter did not warrant setting the election aside (J.A. 64–71). The Board pointed out that, since it was undisputed that *some* of the benefits mentioned in the Company's letters were obtained through collective bargaining at the Company's other plants, the contention that the Union misrepresented the facts rested on the assumption that it was "claiming to have obtained, through collective bargaining with the [Company], *all* of the benefits, or at least all of the 'fringe benefits,' referred to in the [Company's] pre-election letters" (J.A. 67). The Board found that the Union's letter, on its face, showed that it was claiming only that some unspecified benefits referred to by the Com-

pany were obtained by collective bargaining. Moreover, when the Union's letter was read in the context of the Company's letters, the limited character of its claim was even clearer, for some of the benefits referred to by the Company "were of such a nature that the employees could not reasonably have believed that the [Union] was claiming credit for them" (J.A. 68). Accordingly, the Board concluded that the Union's letter did not in fact contain a misrepresentation.

Alternatively, the Board held that, even if the Company's reading of the Union letter were correct, and the Union had misrepresented the facts, the election still should not be set aside (J.A. 68–71). The Board stated that it will not ordinarily police "campaign representations for their truth or falsehood but will allow the good sense of the employees to determine which are true and which are false" (J.A. 68–69). For employees voting in "hotly contested representation elections," like the voters in political elections, know that the parties "frequently make allegations during the campaign which would not be made by a disinterested historian" (J.A. 69). The Board has departed from this principle only where the material misrepresentation was made so soon before the election that the other party could not reply, *and* the employees would give particular weight to the misrepresentation because its source had special knowledge of the true facts. In the Board's view, the situation here did not fall within this exception. The Company's position was clearly set forth in its

prior letters. And the employees would know that the Company, as a party to the prior contract negotiations, would be as well informed as the Union on the question of what benefits ensued from bargaining. Thus, they would not be likely to attribute special weight to the Union's version.

The Board, on August 6, 1958, certified the Union as the collective bargaining representative of the employees in the unit (J.A. 71–72). Thereafter, the Company advised the Union that, until the Board's overruling of its objections to the election was "affirmed by the courts, we must defer recognizing your Union * * *" (J.A. 131–132). The Union filed unfair labor practice charges, and, in the ensuing proceeding, the Board affirmed its decision in the representation case that the Union's letter of March 10 provided no basis for setting the election aside.[2] Accordingly, the Board found that the Company's refusal to bargain with the duly certified Union violated Section 8(a) (5) and (1) of the Act, and ordered the Company to cease and desist from its unfair labor practice and to bargain, upon request, with the Union (J.A. 103–105, 85–97).

B. THE DECISION OF THE COURT OF APPEALS

The court of appeals declined to enforce the Board's order, concluding that the election was vitiated by the

[2] The Board adopted the findings of the Trial Examiner who, after fully reexamining the Company's contentions respecting the Union's letter, arrived at the same conclusion as had the Board in the prior representation case (J.A. 85–97).

Union's misrepresentation in its March 10 letter. The court stated (App., *infra*, pp. 20–22):

> In light of the immediately preceding reference to "all of the fine fringe benefits," the challenged statement cannot reasonably be construed to refer to less than "all" Celanese fringes. If the author had intended to speak of some or several benefits, he would necessarily have had to employ a limiting adjective. * * * Where it has been established that some of the fringes had not thus been obtained, the claim is a misrepresentation of fact, the falsity of which was known to the Union. Characterizing the claim as a "halftruth" does not confer upon it the veracity demanded in respect to material statements made immediately prior to a representation election. *Allis-Chalmers Mfg. Co.* v. *National Labor Relations Board*, 261 F. 2d 613 (7th Cir. 1958). * * *
>
> The Trial Examiner conceded that the Company did not have sufficient time before the election to reply to the Union's final letter. The election was close; a shift of two out of forty-seven votes cast would have altered the result. Under the facts of this case, it cannot be said that the employees were acting under a correct understanding of the facts with respect to the manner in which employee benefits were gained at the time they cast their ballots. The election must, therefore, be held invalid. * * *

Accordingly, the Court set the Board's order aside.

REASONS FOR GRANTING THE WRIT

1. The conclusion of the court below, that a Board representation election must automatically be set aside

whenever it appears that the union in the closing moments of the campaign has made a false or exaggerated claim reflects the same erroneous view of the reviewing court's function in Board representation cases as it has recently manifested in two other decisions: *National Labor Relations Board* v. *Mattison Machine Works,* 274 F. 2d 347 (C.A. 7), certiorari granted, 363 U.S. 826, No. 74, this Term, and *Allis-Chalmers Mfg. Co.* v. *National Labor Relations Board,* 261 F. 2d 613 (C.A. 7). In *Mattison,* the court set aside an election because the election notices and ballots referred to the employer as "Mattison Machine Manufacturing Co." instead of "Mattison Machine Works." In *Allis-Chalmers,* the Union distributed a letter which stated that all the nine benefits, which the employer claimed had been voluntarily given its employees, had been negotiated with the employer by the Union, and passed on to the non-Unionized employees of the particular plant involved in restricted form. The court below set aside the election on the basis that one of the nine items—a college tuition plan—had not been negotiated by the Union. Similarly, the court below here set an election aside because the Union distributed a letter claiming that all the fringe benefits enjoyed by the employees were the result of collective bargaining when in fact some were not. In none of these cases did the court stop to inquire whether there was reasonable basis for the Board's conclusion that the error, if any, did not mislead the employees, but it merely assumed that the defect was sufficient to affect the outcome of the election.

The approach of the court below to representation elections is contrary to the holding of this Court that Congress "has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330. "The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone." *National Labor Relations Board* v. *Waterman Steamship Co.*, 309 U.S. 206, 226. Therefore, the function of a reviewing court with respect to such matters, as has been repeatedly recognized,[3] is confined to guarding against arbitrary or capricious action by the Board. The failure of the court below to follow these settled principles, the same principles involved in *Mattison* which this Court has agreed to review, also makes it appropriate that certiorari be granted here.

2. The Board's policy with respect to policing election propaganda is reasonable, and was properly applied to the facts of this case. Accordingly, the judgment of the Board that the election reflected the employees' free choice was entitled to stand.

The Board's policy that it will not ordinarily set aside an election because of allegedly untruthful statements made by the parties in the campaign[4] rests on the realistic premise that the employees, as a result

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[3] See cases cited in the Government's Brief in *Mattison*, No. 74, this Term, p. 11, note 3.

[4] See cases cited at J.A. 69, notes 11, 13.

of their common sense and experience in political elections, have learned that hyperbole and inaccuracies usually accompany an intense campaign. Consequently, they can generally be trusted to evaluate and discount the conflicting claims that are made preliminary to a representation election. Where, however, special circumstances occur which impair the ability of the employees to evaluate the propaganda—that is, where both a material misrepresentation has been made so soon before the election that the other side could not reply and the employees in all probability gave particular weight to the misrepresentation because its source had special knowledge of the true facts—this premise is no longer true, and the Board will require a new election. See *Merck & Co.*, 104 NLRB 891, 892; *Gummed Products Co.*, 112 NLRB 1092, 1093–1094.

The Board correctly concluded that a new election was not necessary here. Although the alleged Union misstatement occurred in the closing moments of the campaign so that the Company did not have a chance to reply prior to the election, such an opportunity was not required in order to dissipate the effect of the Union's statement. As the Board pointed out (J.A. 92–93, 68–71), the Company had outlined its position that past employee benefits were the result of its voluntary action and not of collective bargaining in a series of letters sent to the employees. The Union's letter, if read as did the court below,* merely advanced

* The Board, however, read the letter to claim only that some of the benefits were the result of Union negotiations (see *supra*, p. 6–7). As so interpreted, it is neither incorrect nor did it

the contrary contention that such benefits were the result of collective bargaining. The employees thus were presented with conflicting contentions which they were free to evaluate. Nor was it likely that they would attribute more significance to the Union's version than the Company's. Since the Company was a party to the past negotiations, the employees could not help but recognize that it was in as good a position as the Union to know what had occurred. Indeed, the benefits in question themselves show that some of them could not conceivably have been initiated by the Union (see J.A. 68, note 9). In these circumstances, the Board not unreasonably concluded that the fact that the Company's denial in effect preceded the Union's, rather than followed it, was not crucial and that, in the absence of any evidence, the Union's inaccuracies in all likelihood did not affect the outcome of the election.

3. As noted in the petition in *Mattison* (No. 74, pp. 7–8, 11), thousands of elections are conducted each year by the Board. The decision of the court below would allow reviewing courts to set aside many of them on the basis of exaggerated or erroneous campaign claims despite the lack of any evidence showing actual prejudice[*] and despite the finding of the

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conflict with the contentions made by the Company in its series of letters.

[*] The burden of proof to sustain the objection to the election and therefore to show prejudice is on the objecting party—*i.e.*, in this case, the Company. See the petition in *Mattison*, No. 74, this Term, p. 11.

Board, based on its extensive experience in election matters, that the erroneous claims did not affect the result. If these elections are to be set aside because of the reviewing court's own evaluation as to when prejudice would likely result, the election machinery, which the statute provides for the speedy resolution of representation questions, would be delayed by time-consuming litigation. This, in turn, would impair the collective bargaining process, since delay in determining the employee representatives with whom the employer must bargain encourages industrial unrest.

Here, as in *Mattison*, it is therefore important to the overall administration of the Act that the decision below be reviewed. Indeed, the defect alleged here as to a misrepresentation in campaigning arises in Board elections more frequently than does the type of error as to election notices and ballots involved in *Mattison* (see J.A. 91–92, note 8).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.[1]

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
General Counsel;
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
RICHARD J. SCUPI,
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National Labor Relations Board.

SEPTEMBER 1960.

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[1] Since the issue involved here is substantially related to that now before this Court in *Mattison*, the Court may wish to grant certiorari and hear argument at the same time in both cases, or to withhold action on this petition until the decision in *Mattison*.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 12857

September Term, 1959—April Session, 1960

CELANESE CORPORATION OF AMERICA, PETITIONER, v. NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD AND CROSS-APPLICATION OF THE BOARD FOR ENFORCEMENT OF SAID ORDER

June 16, 1960

Before SCHNACKENBERG and CASTLE, *Circuit Judges*, and GRUBB, *District Judge*.

GRUBB, *District Judge*. On petition to review and set aside an order of the National Labor Relations Board and cross-application of the Board for enforcement of said order.

The order in issue requires the Celanese Corporation of America (hereinafter called the "Company") to bargain collectively with the Textile Workers Union of America, AFL-CIO (hereinafter called the "Union"), on behalf of certain of the Company's employees at its Point Pleasant plant, following Board certification of the Union as the employees' majority representative. The Company based its refusal to bargain on the alleged invalidity of the

election and certification arising out of pre-election activities by the Union.

In the election held on March 12, 1958, among the approximately forty-eight employees in the bargaining unit at the Point Pleasant plant, twenty-five votes favored the Union while twenty-two opposed it.

During the pre-election period the Company sent a series of eleven letters, addressed individually to each employee who was involved in the election and signed on behalf of the Company by Paul C. Pearson, Plant Manager, Point Pleasant plant. The first letter, dated February 14, 1958, expressed the Company's view that the employees did not need the Union to speak on their behalf in their relationship with the Company. Subsequent letters in support of this view explained and described Company policies as to employee benefits and working conditions. The Company's final letter, dated March 8, 1958, summarizes the previous correspondence as dealing with policy in respect to job security, working conditions, seniority and promotions, group insurance, vacations, holidays, and job descriptions. It continues to describe changes in the wage program and wage increases since the plant began operations in 1956 and further states that these changes were made through individual progress and "not because a labor organization demanded that they be done."

The Union replied to the Company's communications with two letters, the latter of which, dated March 10, 1958, reads in part as follows:

> Dear Friend:
>
> The repetitious letters sent to you by the Plant Manager seem to betray an inner sense of guilt. In his letters, Mr. Pearson seems to be taking credit for almost everything but the Declaration of Independence.

> He says that all of the fine fringe benefits show the Company's interest in your concern. This could be something less than the truth, for the fact is that Celanese fringes, as well as other plant conditions, were won through collective bargaining and in many instances over the initial opposition of the Company.

The letter was signed by Morris Riger, Regional Director.

It was stipulated that about twenty copies of this letter were delivered by hand to employees at their homes on the afternoon of March 10, 1958, and that the remainder were deposited in the mail box outside the Point Pleasant Post Office about 6:30 P.M. on March 10, 1958. The Company first saw a copy of this letter about 1:30 P.M. on March 11, 1958. The plant manager testified that a number of employees were not readily available at this time or in the interval before the polls opened at 6:30 A.M. on March 12, 1958.

The Company objects to the election on the ground that the above-quoted portion of the Union's letter contained a material misrepresentation of fact, made within twenty-four hours of the election at a time which did not permit the Company to acquaint the employees of the misrepresentation. A hearing was had on this objection in conjunction with the unfair labor practice proceeding based on the Company's refusal to bargain.

The Trial Examiner held that the challenged letter did not invalidate the election. He concluded that the letter could reasonably be read as a claim by the Union that "some" Celanese fringes were won through collective bargaining when viewed in the light of the Company's previous letters since some of the benefits discussed were of such nature that the employees could not reasonably have believed that the Union was claim-

ing credit for them. Even if the Company's interpretation of this language as reading that "all" Celanese fringes were won through collective bargaining were accepted, the Trial Examiner believed that the Union's claim at most amounted to a "half-truth." He did not make a specific finding as to the truth or falsity of the Union communication. The Board adopted the Trial Examiner's report and recommendation and issued the order being reviewed here.

This court does not agree with the holding of the Board. The content of the Union's communication to the employees and the manner of its distribution go beyond the bounds of "legitimate propaganda." These activities fall below the standard to be observed in representation elections as set forth by the Board and as approved by the courts. See *The Gummed Products Company*, 112 N.L.R.B. 1092; *The Matter of General Shoe Corp.*, 77 N.L.R.B. 124; and *Kearney & Trecker Corp.* v. *National Labor Relations Board*, 210 F. 2d 852 (7th Cir. 1954).

In light of the immediately preceding reference to "all of the fine fringe benefits," the challenged statement cannot reasonably be construed to refer to less than "all" Celanese fringes. If the author had intended to speak of some or several benefits, he would necessarily have had to employ a limiting adjective. The record establishes that some Celanese benefits, as for example the group insurance and retirement pension plans, were initiated and maintained unilaterally by the Company, while other benefits, such as vacations, holidays, pay for jury duty and funeral leave, had been the subject of collective bargaining by the Company and labor organizations at other plants. There had been no union and no negotiations with any union concerning the particular employees involved at the Point Pleasant plant. Apparently the Union

is referring to some dealings of the Company and unions at other plants.

The Trial Examiner had concluded that the Company's letters carried the implication that the Company voluntarily granted the benefits discussed in the correspondence without benefit of collective bargaining. The claim in the Company's final letter that certain changes were made because of individual progress rather than as a result of a union demand refers to changes in wages discussed immediately preceding this statement. Clearly, the Company was attempting to convey the impression that the employees were enjoying existing benefits and working conditions without present Union representation at the Point Pleasant plant, while the Union points out that these gains have been derived as a result of prior Union activities. In this context, a claim by the Union that "all" Celanese fringes were the result of collective bargaining is significant and material. Where it has been established that some of the fringes had not thus been obtained, the claim is a misrepresentation of fact, the falsity of which was known to the Union. Characterizing the claim as a "half-truth" does not confer upon it the veracity demanded in respect to material statements made immediately prior to a representation election. *Allis-Chalmers Mfg. Co.* v. *National Labor Relations Board*, 261 F. 2d 613 7th Cir. 1958). Nor may a false statement be excused on the ground that it was in answer to prior Company statements carrying possibly erroneous implications. See *United Aircraft Corp.*, 103 N.L.R.B. 102.

The misrepresentation of fact here does not fall within the pre-election publicity "prattle" condoned in *Olson Rug Co.* v. *National Labor Relations Board*, 260 F. 2d 255 (7th Cir. 1958), where the challenged statements concerned predictions of the future.

The Trial Examiner conceded that the Company did not have sufficient time before the election to reply to the Union's final letter. The election was close; a shift of two out of forty-seven votes cast would have altered the result. Under the facts of this case, it cannot be said that the employees were acting under a correct understanding of the facts with respect to the manner in which employee benefits were gained at the time they cast their ballots. The election must, therefore, be held invalid. See *National Labor Relations Board* v. *Trinity Steel Co., Inc.*, 214 F. 2d 120 (5th Cir. 1954).

This conclusion makes unnecessary a consideration of other objections raised by the Company.

Order set aside and cross-application for enforcement denied.

A true Copy:

Teste:

_____,

Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CHICAGO 10, ILLINOIS

Thursday, June 16, 1960

No. 12857

CELANESE CORPORATION OF AMERICA, PETITIONER, v. NATIONAL LABOR RELATIONS BOARD, RESPONDENT

PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*, Hon. LATHAM CASTLE, *Circuit Judge*, and Hon. KENNETH P. GRUBB, *District Judge*.

This cause came on to be heard on the petition for review of an order of the National Labor Relations Board, the answer and request for enforcement of said order, the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the order entered in this cause by the National Labor Relations Board on November 25, 1959 be, and the same is hereby, set aside, and the petition for enforcement of said order is hereby denied, in accordance with the opinion of this Court filed this day.

A True Copy:

Teste:

[SEAL] KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 382

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

CELANESE CORPORATION OF AMERICA, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the Court below was correct in denying enforcement of an order of the National Labor Relations Board requiring the Respondent to bargain with a union, where the Court rejected on the basis of insufficient evidence the Board's finding that the union represented a majority of the Respondent's employees.

2. Whether the Court below was correct in holding that a representation election, relied upon by the Board as the sole basis of its finding of majority representation by the union, was an invalid expression of employee choice where the union on the eve of the election circulated a letter to employees containing a material misrepresentation of fact.

STATEMENT OF THE CASE

Pursuant to a "Stipulation for Certification Upon Consent Election" approved on March 5, 1958 (JA 6), an election was held on March 12, 1958 (JA 6, 107) among the approximately forty-eight (48) employees in the bargaining unit at the Employer's plant (JA 111). Of the forty-seven (47) ballots cast, twenty-five (25) favored the Union and twenty-two (22) opposed the Union (JA 6). There were no void or challenged ballots (JA 6). A change in two (2) votes would have changed the results of the election.

The circumstances preceding the election which led to the Company's objections to the validity of the results involved a series of eleven (11) letters circulated by the Company to the employees, designed to review the facts concerning wages, fringe benefits, and working conditions of the employees.

In brief, these letters reviewed the Company's policy of maintaining full employment even during business dips by the use of outside contractors whose services could be eliminated during periods when production was reduced (JA 36-38); the disciplinary policies with respect to job security (JA 39-40); promotions through the posting of job opportunities (JA 41-43); the hospitalization and group insurance program, the cost of which was borne entirely by the Company (JA

43-44, 48-51, 51-54), and its retirement program (JA 43-44); the Company efforts to provide better working conditions and conveniences for its employees, including its financial assistance to a recreational club for employees (JA 43-44); its practice of avoiding lay-offs by assigning work to employees in jobs other than their primary ones (JA 45); its seniority policies and welder training program (JA 46-47); pay for jury duty, funeral leave, premium pay for second and third shifts, and two-and-a-half times pay for work performed on recognized holidays (JA 48-51); its wage program and wage rates (JA 48-51, 55-58).

Three of the Company's letters were devoted in whole or in part to the Company's group hospitalization, surgical, and life insurance programs (JA 43-44, 48-51, 51-54).

The Union distributed two letters to the employees (JA 59-63). The second letter (to which the Company objects) was dated March 10, 1958 (JA 61). It was delivered by hand to some 20 of the employees on March 10 (JA 92, 115) and was presumably received by the rest of the employees on March 11, the day before the election, since the remainder of the letters sent to the employees were deposited in the mail box near the plant at 6:30 P.M. on March 10 (JA 92, 115).

The letter claimed that the aforementioned "Celanese fringes" and "other plant conditions" had been won by the Union through collective bargaining (JA 61), stating in part:

> ". . . He [the plant manager] says that all of the fine fringe benefits show the Company's interest in your concern. This could be something less than the truth, for the fact is that Celanese fringes,

> as well as other plant conditions, were won through collective bargaining, and in many instances over the initial opposition of the Company.
>
> "Mr. Pearson, the plant manager, does not know much about this, since many of the gains won by the Union for Celanese workers date back to a time when he was just a youngster . . ."

The Company was not informed of this letter until about 1:40 P.M. on March 11, 1958 (JA 92, 113), the day preceding the election. At this time, eight employees were not in the plant (JA 112). By 3:00 P.M.—one-and-one-half hours after the letter reached the Company—five additional employees, comprising the production day shift, had left the plant (JA 113). By 4:00 P.M. seventeen more employees, comprising the bulk of the maintenance and warehouse group, had completed their shifts (JA 113). By 6:00 P.M. only the regular shift of six people remained in the plant (JA 113). In short, by 4:00 P.M. 30 employees had left the plant for the day; by 6:00 P.M. the number had increased to 35 employees. None of the employees who had left the plant was scheduled to re-enter the plant before the day of the election, when the polls were scheduled to open at 6:30 A.M. (JA 113).[1]

The Company filed objections to the election, alleging that on the eve of the election the Union had circulated among the employees a letter which contained misrepresentations of fact on material issues involved in the election, thereby affecting the results, so that the tally of ballots did not comprise a true determination

[1] The trial examiner, whose decision and recommendations were adopted by the Board, conceded that ". . . the Respondent did not have sufficient time before the election to reply to the Union letter. . . ." (JA 92).

of the wishes of the employees with respect to representation by the Union (JA 4-5).

On April 7, 1958 the Regional Director of the Board issued a report on objections (JA 6-18). The report contained no findings of fact concerning the truth or falsity of the Union's assertions, but rather recommended that the Board overrule, without hearing, such objections on the ground that they did not raise "any material or substantial issue with respect to the results of the election" (JA 11).

The Company filed exceptions to the Regional Director's Report, together with a supporting brief and request for oral argument before the Board (JA 19-63). In support of its contention that the Union misrepresented the origin of employee benefits enumerated in the Company letters, the Company submitted in its brief[2] that it had provided for its employees unilaterally as a result of Company policy rather than collective bargaining a comprehensive retirement plan and a plan of group insurance covering hospital, surgical and polio expense benefits, life insurance, accidental death and dismemberment benefits, accident and sickness benefits (JA 27),[3] as well as other important fringes (JA 27, 28). It pointed out that such benefits were never "won through collective bargaining and in many instances over the initial opposition of the Company", as the

[2] Inasmuch as no hearing had been held on the issues raised by the Company, the only means whereby the Company could support its contention was through written argument to the Board and its representatives.

[3] The aforementioned benefits were enumerated in the letters sent by the Company on February 25, March 4 and March 6 (JA 43, 49, 51-54).

Union had erroneously claimed in its letter of March 10 (JA 28).

On August 6, 1958, without affording the Company any hearing and without any evidence (other than the Company's objections) before it, the Board denied the request for oral argument, overruled the Company's objections, and issued a certification that the Union was the majority representative of the employees (JA 64-72).

Thereafter, the Company declined to meet with the Union for the purposes of collective bargaining because it believed that the Union did not represent a majority of the employees in the stipulated unit (JA 75-76, 131-132).

Subsequently a complaint issued, eventuating in the determination by the Board that the Company had illegally refused to bargain with the Union. The opinion of the trial examiner, which was adopted *in toto* by the Board, rested on two grounds: that the disputed language of the union's letter to employees stated that *some* rather than *all* of the benefits granted by the Company were the result of collective bargaining with the union;[1] that even if the letter were to claim credit for all benefits so granted, that such a falsehood amounted merely to a harmless "half-truth" which did

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[1] The Board's Petition for certiorari misstates in one respect the Respondent's position in the initial representation case. The reference (p. 6) that "it was undisputed that *some* of the benefits mentioned in the Company's letters were obtained through collective bargaining at the Company's other plants" [original emphasis] is misleading, for without conceding that identical benefits were negotiated at other plants, the Company merely drew to the Board's attention the fact that the establishment of the group insurance program was plainly independent of benefits existing at other plants.

not affect the results of the election. Although the trial examiner conceded that Respondent did not have sufficient time before the election to reply to the allegations of the union's letter (JA 92), he dismissed its import by averring that the series of Company letters theretofore distributed had implicitly claimed that the Company established such benefits (JA 92, 93).

ARGUMENT

The suggestion that this case presents any issue which justifies a petition by the Government for a writ of certiorari is without foundation. The only question before the Court of Appeals was factual, and no strained analogy to the *Mattison*[5] decision can transform a routine application of a familiar legal rule to a particular set of facts into an issue which would warrant review of the instant case by this Court. In fact the Petition does not refer to any of the grounds enumerated in Rule 19(b) for granting a writ of certiorari. The absence of any such express reference is significant, for an analysis of the matter reveals that no such ground exists.

Conceivably an issue of importance might be presented in a case where a court of appeals in reversing the Board, did so because it disapproved of a recognized regulation or rule of decision adopted by that agency to govern the elections of employee representatives. It is plain that this is not the situation here. Far from disapproving of a Board rule, the Court below accepted as applicable law the doctrine the Board itself enunciated in the *Gummed Products* case, 112 NLRB 1092, and described in a recent Annual Report (JA 29) as follows:

[5] *N.L.R.B.* v. *Mattison Machine Works*, 274 F. 2d 347, *cert. granted* 363 U.S. 826, No. 74 this term.

> "... when one of the parties deliberately misstates material facts which are within its special knowledge, under such circumstances that the other party cannot learn about them in time to point out the errors to the employees and the employees do not have independent knowledge which will enable them properly to evaluate the misstatements, the Board will set aside the election ..." (See pages 54-55 of the Twenty-second Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1957.)

This very principle is alluded to in the Petition (p. 7) as a recognized exception to the Board's more general policy against policing the the truth or falsity of campaign propaganda. What the Court did was to examine the evidence which presumably constituted the basis of the Board's finding (or assumption) that no material misrepresentation affecting the results of the election had been made, and to conclude that because of the absence of support in the record as a whole for such a finding, the Board erred in failing to apply its own rule.

Particularly noteworthy in this context is the following paragraph of the Court's opinion:

> "This court does not agree with the holding of the Board. The content of the Union's communication to the employees and the manner of its distribution go beyond the bounds of 'legitimate' propaganda'. These activities fall below the standards to be observed in representation elections *as set forth by the Board and as approved by the courts.* (Emphasis supplied.) See *The Gummed Products Company*, 112 NLRB 1092; *The Matter of General Shoe Corp.*, 77 NLRB 124, and *Kearney & Trecker Corp.* v. *National Labor Relations Board*, 210 F. 2d 852 (7th Cir. 1954)."

In the *Gummed Products* case, where the Board stated the rule that a factual misrepresentation made by one of the parties will vitiate an election if uttered at a time when it could neither be evaluated or rebutted, the Board said, 112 NLRB at 1093:

> "The ultimate consideration is whether the challenged propaganda has lowered the standards of campaigning to the point where it may be said that the uninhibited desires of the employees cannot be determined in the election."

1. The Decision Below Is Plainly Correct

As one of the two grounds of its holding, the Board construed the language of the Union's letter, quoted *supra*, as claiming credit for *some* rather than *all* fringe benefits, and said that the claim so construed was true. To read the letter in such a way, of course, necessitates the arbitrary insertion of the word "some" before the words "Celanese fringes, as well as other plant conditions, were won through collective bargaining . . .". There was no evidence in the record to show that the writer of the Union letter in any other document or speech to the employees ever conveyed so limited a claim. Moreover, it is obvious that the propaganda value of this last minute attempt to discredit the Company would have been lost had the Union taken so modest a position.

The Court, in the absence of any evidence to support the qualified meaning the Board had read into the Union's claim, held contrary to the Board that "the challenged statement cannot reasonably be construed to refer to less than 'all' Celanese fringes". As the record indisputably established that the major fringe benefits like the systemwide group health insurance and pension plans had been unilaterally established by

the Company, the Court held that the Union's representation was both false and material.

Unless some rule of law renders even the most fanciful reading by the Board of a document intended to be understood by factory employees, immune from judicial review, the Court's finding that the Union letter did constitute "a misrepresentation of fact, the falsity of which was known to the Union" was not only correct, but obviously within the province of a reviewing court under Section 10(e) and (f) of the National Labor Relations Act.

With respect to the secondary ground relied on by the Board—that the Union's false statements to employees would not vitiate an election under the application of the *Gummed Products* doctrine—the Court disagreed with the Board's novel contention that, although the falsehoods were concededly circulated at a time when no reply was possible, the Company had rebutted such contentions through its series of letters *previously* sent to the employees. The Court, noting the trial examiner's concession that the Company did not have sufficient time to reply to the allegations, found no evidence to support the view that *prior* Company letters had apprised the employees of the fallacies of the Union's claim.

Moreover, the Union was a party to the collective bargaining alluded to in its letters—thus satisfying the *Gummed Products* criterion of a party with special knowledge of the actual facts. Hence there was no basis for the Board, acting on its own rule, to believe that the employees were not misled through reliance on the Union's assertions, and the Court, on the record before it, had no alternative but to set aside this finding.

Thus the Court, far from failing "to inquire whether there was reasonable basis for the Board's conclusion that the error, if any, did not mislead the employees" (Pet., p. 10) made an express holding on this point.[6] In so holding, the Court relied entirely on the inferences to be drawn from the Board's own standards, for the Board's decision turned on the validity of either the finding (a) that the Union letter contained *no* material misrepresentation, or (b) that the employees would *not* give particular weight to the misrepresentation because its source [i.e., the Union] had *no* special knowledge of the true facts. The Board apparently concedes at page 7 of its Petition here that these are the determinative facts, and that had the Board answered these factual questions in the affirmative, it, like the Court below, would have vitiated the election.

It is highly inaccurate, therefore, to characterize the decision of the Court below as standing for the proposition "that a Board representation election must automatically be set aside whenever it appears that the union in the closing moments of the campaign has made a false or exaggerated claim" (Pet., pp. 9-10).

The text of the opinion (Pet., 17-22) shows that the Court inquired far more exhaustively into the issues than did either the Board or the trial examiner. For example, it considered one point concerning which no agency finding whatsoever was made, viz., whether or not the sentence in the Company's final letter, quoted in the petition (p. 4), was tantamount to a claim on the part of the Company that no fringe benefit in any

[6] "Under the facts of this case, it cannot be said that the employees were acting under a correct understanding of the facts with respect to the manner in which employee benefits were gained at the time they cast their ballots . . . ." (Pet., p. 22).

of its plants had been obtained by collective bargaining. In his brief and argument in the circuit court, Board counsel advanced this contention as a justification for the Union's closing broadside. Despite the absence of any Board finding on this question, the Court inquired into this aspect of the matter, but after reading the entire letter rejected this argument on the ground that—

> ". . . The claim in the Company's final letter that certain changes were made because of individual progress rather than as a result of a union demand refers to changes in wages discussed immediately preceding this statement. Clearly, the Company was attempting to convey the impression that the employees were enjoying existing benefits and working conditions without present Union representation at the Point Pleasant plant, while the Union points out that these gains have been derived as a result of prior Union activities." (Pet., p. 21)

2. No Question of Importance Is Presented

Although studiously avoiding any reference to Rule 19(b), the Board in its Petition, referring to the fact that it conducts thousands of elections each year, contends that it is "important to the overall administration of the Act that the decision below be reviewed" (Pet., pp. 13-14). In view of the fact that the *Gummed Products* rule, or indeed any general rule covering the conduct of elections is not in issue here, it is difficult to understand how the question presented to the Court below assumes general importance.

The propaganda engaged in by unions and employers in employee election campaigns is usually tailor-made for the problems of the particular plant or industry and for the real or assumed receptivity of the workers

employed there to particular lines of argument. Indeed, except for the *Allis-Chalmers* case,[7] the Board Petition cites no administrative or judicial proceeding which bears any close resemblance to the case at bar.

The Board's reference to *N.L.R.B.* v. *Mattison Machine Works*, 274 F. 2d 347 (CA 7), *cert. granted* 363 U.S. 826, No. 74, has no applicability to the instant case. The *Mattison* decision involved the evaluation by the Board of the effect on an election of a clerical error made by Board personnel which resulted in the misstatement of the employer's name on the notices of election and ballots. The Court rejected the Board's policy determination that such a technical oversight, under the particular circumstances, was not sufficient to void the election.

It is clear that the holding in that case involves no dispute between the Court and the Board concerning the substantial evidence rule, but rather the question of whether judicial decisions regarding misprinted ballots in public elections should govern. In the instant case, the Court merely refused to permit the Board to apply its rule in a manner inconsistent with the undisputed evidence of record. The Board's suggestion that this Court grant certiorari and combine this case for hearing with *Mattison*, or defer ruling on its petition until disposition of *Mattison*, is unjustifiable in view of the fact that the two cases lack a common issue. Indeed, such a disposition of this petition would be prejudicial to the respondent.

The Board's emphasis on dicta by this Court (Pet., p. 11) in *N.L.R.B.* v. *A. J. Tower Co.*, 329 U.S. 324, and *N.L.R.B.* v. *Waterman Steamship Co.*, 309 U.S.

[7] *Allis-Chalmers Mfg. Co.* v. *N.L.R.B.*, 261 F. 2d 613 (CA 7).

206, is misplaced here. The *A. J. Tower* case dealt with the legitimacy of a published Board regulation concerning election procedure, viz., waiver of objections to a voter's eligibility where the party raising objections had failed to challenge the ballot at the appropriate time. The quotation from *Waterman*[8] merely affirmed the propriety of Board action in deferring action on an election petition filed by one union until the company ceased its discriminatory practices against a rival union.

It can scarcely be said that this Court's approval of rules adopted by the Board to deal with those problems in any way restricts judicial review of the factual findings of the Board on which the Board relies in applying its rule in a particular case. Whatever latitude may be accorded the Board as an expert body in establishing rules governing election procedures, nothing in the statute endows the Board with any unreviewable authority to make findings of fact. In this latter area, the Board is required to base its findings on substantial evidence on the record as a whole, and its failure to do so may be corrected by the Circuit Court of Appeals upon review.

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[8] Much of the general language in the *Waterman* opinion cannot be taken at face value today in view of subsequent amendments enlarging the scope of judicial review. See *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, at 477-478.

CONCLUSION

For the aforementioned reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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